Ramlah bte Abdullah v Talasco Insurance Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-02–65 OF 2006
JAMES FOONG, ZALEHA ZAHARI AND KN SEGARA JJCA
23 JANUARY 2009

Road Traffic — Insurance — Claim for premium — Third party claim against insurer — Motor Insurance Bureau of West Malaysia ('MIB') — Whether High Court erred in refusing to entertain appellant's claim against MIB

Road Traffic — Insurance — Claim for premium — Third party claim — Third party claim against insurer — Whether car was driven by person who had order or permission of insured — Whether third party risks insurance policy was ineffective — Whether respondents could rely on principle of res judicata because issue of consent of insured to drive motorcar had already been decided in earlier civil suit — Road Transport Act 1987 ss 91(1), 96(1)

Tort — Vicarious liability — Accident causing personal injury — Motor vehicle accident — Whether owner of car vicariously liable for acts of driver of car — Whether car was driven by person who had order or permission of owner of car

On 6 May 1989, the appellant was travelling along the Kuantan Kemaman Highway, as a passenger in a motorcar, when another motorcar No BCQ 8343 collided with the motorcar she was travelling in. The appellant was severely injured as a result of this accident. At the time of the accident the registered owner of BCQ 8343 was Proton ('the second respondent') but the car was used by one of its executives by the name of Ang Yew Jin (Ang) who had in turn lent the car to one Ahmad for the latter's journey to Terengganu. At the material time Ahmad had requested his brother Wan Din to take over the wheels because he was tired. It was while Wan Din was at the wheels that the accident occurred. On 14 April 1994, the appellant filed a civil action, which was subsequently transferred to the sessions court, against Wan Din as the first defendant for negligently driving the motorcar BCQ 8343 and against Proton as the second defendant for being the owner of the said motorcar. In this civil action Proton submitted that it was not vicariously liable to the appellant because Wan Din was not its servant and/or agent and was in fact driving the car without its order or permission. On 27 July 1999 the sessions court allowed the appellant's claim against Wan Din and awarded

her a sum of RM554,979.26 as damages, interest and costs (the judgment sum) but dismissed the appellant's claim against Proton. The appellant did not appeal against this decision but instead followed with a civil suit in the High Court against Talasco ('the first respondent') as the insurer of motorcar BCQ 8343 for the recovery of the judgment sum and against Proton, the insured, as the second respondent. In its defence the first respondent submitted that since Wan Din was not permitted by the second respondent to drive the motorcar BCQ 8343, the first respondent was not obliged under s 96(1) of the Road Transport Act 1987 ('RTA') to settle the judgment sum. The first respondent therefore contended that it was not liable to the appellant because the insurance policy which it had issued to the second respondent for the use of the car was ineffective. The second respondent also supported the stand taken by the first respondent and in addition highlighted the fact that the sessions court had already dismissed the appellant's claim against the second respondent for being vicariously liable for the acts of Wan Din. The High Court arrived at the conclusion that since there was no express or implied consent given by the second respondent to Wan Din to drive the motorcar, the third party risks policy taken out by the second respondent from the first respondent was ineffective and that since the policy was ineffective, the appellant's claim against the first respondent insurer under s 96(1) of the RTA must also fail. In addition the High Court decided not to entertain the appellant's claim against the Motor Insurance Bureau of West Malaysia ('MIB') on the ground that this was not pleaded by the appellant. This was the appellant's appeal against that decision. It involved two issues, namely, whether the High Court erred in refusing to entertain the appellant's claim against MIB and whether the third party risks insurance policy was ineffective.

Held, dismissing the appeal with costs:

(1) The appellant's pleaded case was that since the first respondent had issued an insurance policy against third party risks for the said car, it should settle the judgment sum. It was based solely on the statutory provision of s 96(1) of the RTA. The appellant had never sought recovery under the principal agreement which MIB had with the Minister of Transport or under the MIB domestic agreement. If this were the case the appellant would have pleaded this and included MIB as a party to the proceedings. Since the appellant had not included MIB as a party to the proceedings or framed a claim against them the trial judge was correct in his finding on this issue (see para 24).

(2) The first respondent had issued to the second respondent a policy to cover a class of persons 'who is driving on the policyholder's order or with their permission'. Thus if a person who drove the car is not within

this class of persons, then the policy is not effective on such occasion. In the earlier civil action the sessions court had already found that the second respondent was not vicariously liable. This would inevitably mean that no implied order or permission had been given by the second respondent to Wan Din at the material time to drive the said motorcar (see paras 25, 28, 29 & 30).

(3) The issue of whether the second respondent had ordered or given permission to Wan Din to drive the car at the material time had already been decided by the sessions court in the earlier civil suit. This matter had been decisively determined and there was no appeal against it. As such, relying on the principle of res judicata, this same issue should not be litigated again. Although it may be argued that the appellant and the second respondent were common parties in the earlier civil action but not the first respondent it is well settled law that in a recovery proceeding under s 96(1) of the RTA, the role of the second respondent as the insured is assumed by the insurance company which issued the third party risks policy. By this the first respondent was considered a party in the earlier civil action too (see paras 32 & 33).

[Bahasa Malaysia summary

Pada May 1989, perayu yang dalam perjalanan di sepanjang Lebuhraya Kuantan Kemaman, sebagai penumpang sebuah kereta, apabila sebuah lagi kereta bernombor pendaftaran BCQ 8343 berlanggar dengan kereta yang dinaiki perayu. Perayu cedera parah dalam kemalangan tersebut. Pada masa kemalangan, pemilik berdaftar BCQ 8343 itu adalah Proton ('responden kedua') tetapi kereta tersebut dipakai oleh eksekutifnya, Ang Yew Jin yang meminjamkan kereta tersebut kepada Ahmad untuk perjalanannya ke Terengganu. Pada masa yang material Ahmad meminta abangnya Wan Din pula memandu kerana dia keletihan. Ketika Wan Din memandulah kemalangan itu berlaku. Pada 14 April 1994, perayu memfailkan tindakan sivil yang kemudiannya dipindahkan ke mahkamah sesyen terhadap Wan Din sebagai defendan pertama kerana cuai memandu kereta BCQ 8343 dan juga terhadap Proton sebagai defendan kedua kerana memiliki kereta tersebut. Dalam tindakan sivil ini, Proton menyatakan bahawa Proton tidak bertanggungan secara vikarius terhadap perayu kerana Wan Din bukan pekerja dan/atau ejennya, malah dia memandu kereta tersebut tanpa perintah mahu pun keizinannya. Pada 27 Julai 1999, mahkamah sesyen membenarkan tuntutan perayu terhadap Wan Din dan memberikan sejumlah RM554,979.26 sebagai ganti rugi, faedah dan kos (jumlah penghakiman tersebut) tetapi menolak tuntutan perayu terhadap Proton. Perayu tidak merayu terhadap keputusan ini malah sebaliknya meneruskan tindakan sivil ke Mahkamah Tinggi terhadap Talasco ('responden pertama') sebagai syarikat insurans kereta BCQ 8343 bagi mendapatkan semula jumlah penghakiman

tersebut dan juga terhadap Proton, yang diinsuranskan, sebagai responden kedua. Dalam pembelaannya, responden pertama menyatakan bahawa oleh sebab Wan Din tidak mendapat keizinan responden kedua untuk memandu kereta BCQ 8343, responden pertama tidak bertanggungjawab seperti yang diperuntukkan dalam s 96(1) Akta Pengangkutan Jalan 1987 ('APJ') untuk menjelaskan jumlah penghakiman tersebut. Responden pertama menegaskan bahawa responden tidak bertanggungan terhadap perayu kerana polisi insurans yang dikeluarkan terhadap responden kedua atas kegunaan kereta tersebut tidak efektif. Responden kedua juga menyokong hujahan responden pertama dan seterusnya menegaskan bahawa mahkamah sesyen telah pun menolak tuntutan perayu terhadap responden kedua yang menyatakan bahawa responden kedua bertanggungan secara vikarius terhadap tindakan Wan Din. Mahkamah Tinggi memutuskan bahawa memandangkan tiada persetujuan secara langsung atau tak langsung diberikan oleh responden kedua kepada Wan Din untuk memandu kereta tersebut, polisi risiko pihak ketiga yang diambil oleh responden kedua daripada responden pertama tidak efektif, dan oleh sebab tidak efektif, tuntutan perayu terhadap syarikat insurans responden pertama di bawah s 96(1) APJ juga seharusnya gagal. Selanjutnya, Mahkamah Tinggi memutuskan tidak akan melayan tuntutan perayu terhadap Motor Insurance Bureau of West Malaysia ('MIB') atas alasan bahawa ini tidak diplidkan oleh perayu. Ini merupakan rayuan perayu terhadap keputusan tersebut. Rayuan ini melibatkan dua isu, iaitu sama ada Mahkamah Tinggi salah apabila enggan melayan tuntutan perayu terhadap MIB dan sama ada polisi insurans risiko pihak ketiga tidak efektif.

Diputuskan, menolak rayuan dengan kos:

(1) Rayuan perayu adalah memandangkan responden pertama telah mengeluarkan polisi insurans risiko pihak ketiga untuk kereta tersebut, maka responden pertama harus menyelesaikan jumlah penghakiman tersebut. Rayuan tersebut berdasarkan peruntukan statutori s 96(1) APJ semata-mata. Perayu tidak pernah memohon tindakan mendapatkan semula di bawah perjanjian utama, antara MIB dan Kementerian Pengangkutan atau pun di bawah penjanjian domestik MIB. Jika wujudnya perjanjian sebegini, tentunya perayu memplidkan hal perkara ini dan memasukkan MIB sebagai salah satu pihak dalam prosiding. Memandangkan perayu tidak memasukkan MIB sebagai salah satu pihak dalam prosidng atau merangka satu tuntutan terhadapnya, keputusan hakim bicara dalam isu ini adalah tepat (lihat perenggan 24).

(2) Responden pertama mengeluarkan polisi kepada responden kedua untuk melindungi kumpulan orang 'who is driving on the policyholder's order or with their permission'. Maka, jika orang yang memandu kereta tersebut bukan dalam golongan sedemikian, maka

polisi tersebut tidak efektif. Dalam tindakan sivil sebelum ini, mahkamah sesyen mendapati bahawa responden kedua tidak bertanggungan secara vikarius. Ini semestinya bermaksud bahawa tiada perintah tak langsung atau keizinan diberikan oleh responden kedua kepada Wan Din pada masa yang material untuk memandu kereta tersebut (lihat perenggan 25, 28, 29, & 30).

(3) Isu sama ada responden kedua telah memerintahkan atau memberi keizinan kepada Wan Din memandu kereta pada masa yang material itu telah diputuskan oleh mahkamah sesyen dalam tindakan sivil sebelum ini. Perkara ini telah muktamad diputuskan dan tiada rayuan berkenaannya. Oleh itu, memakai prinsip res judicata, isu yang sama tidak harus dipertikaikan lagi. Walaupun ia boleh dihujahkan bahawa perayu dan responden kedua merupakan pihak-pihak bersama dalam tindakan sivil sebelum ini, tetapi bukan responden pertama, ia adalah undang-undang nyata bahawa dalam prosiding mendapatkan semula di bawah s 96(1) APJ, peranan responden kedua sebagai pihak yang diinsuranskan adalah diandaikan oleh syarikat insurans yang mengeluarkan polisi risiko pihak ketiga. Dengan itu, responden pertama juga dianggap sebagai salah satu pihak dalam tindakan sivil sebelum ini (lihat perenggan 32 & 33).]

Notes

Cases referred to

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57; [1997] 2 CLJ 104, CA (refd)

Rafiah bte Bakar v East West-UMI Insurance Bhd [1993] 1 MLJ 39; [1992] 1 AMR 440, HC (refd)

Ramli Shahdan & Anor v Motor Insurer's Bureau of West Malaysia & Anor [2006] 2 MLJ 116; [2006] 1 CLJ 224, CA (refd)

Legislation referred to

Road Transport Act 1987 s 96(1)

Americk Sidhu (Isharidah Ho Chong & Menon) for the appellant.
Mohd Fuad bin Husaini (Othman Hashim & Co) for the first respondent.
S Nantha Balan (Daya Nair with him) (Nik Saghir & Ismail) for the second respondent.

James Foong JCA (delivering judgment of the court):

INTRODUCTION

[1] The High Court has dismissed the appellant's recovery claim with costs against the first respondent (Talasco) made under s 96(1) of the Road

Transport Act 1987 (RTA). It also dismissed Talasco's third party claim against the second respondent (Proton) with costs to be paid by the appellant. Dissatisfied with this decision, the appellant appealed to us.

BACKGROUND

[2] On 6 May 1989 the appellant was a passenger in a motorcar No WBK 398. While it was travelling along the Kuantan–Kemaman Highway at or about 2.30am it was collided into by another motorcar No. BCQ 8343. At the material time, BCQ 8343 was driven by one Wan Din bin Hussin (Wan Din). As a result of this accident, the appellant was severely injured.

[3] On 14 April 1994, the appellant filed a civil action in the High Court at Kuantan against Wan Din as first defendant who negligently drove the motorcar BCQ 8343 and against Proton, as second defendant, for being the owner of the said car.

[4] This civil action was subsequently transferred to the sessions court at Kuala Terengganu bearing No 53–100 of 1998. I shall refer to this civil action as Civil Action 53–100 of 1998.

[5] On 27 July 1999, the sessions court at Kuala Terengganu after hearing allowed the appellant's claim against Wan Din (Wan Din having failed to defend the action) and awarded her a sum of RM554,979.26 as damages, interest and costs. The appellant's claim against Proton was dismissed.

[6] On 10 September 1991, the appellant gave notice under s 96(2)of the RTA to Talasco, the insurer of BCQ 8343 at the material time of the accident. This was soon followed by this civil suit against Talasco for the recovery of the judgment sum handed down in Civil Action 53–100 of 1998.

[7] Talasco, the defendant in this civil suit, brought in Proton as third party under s 95 of the RTA to recover from Proton any sum Talasco may be ordered to pay the appellant.

PRINCIPAL ISSUE: PREVIOUS FINDING OF PROTON NOT BEING VICARIOUSLY LIABLE

[8] Talasco's main defence is that they are not liable to the appellant since the insurance policy which they issued to Proton for the use of the said car is ineffective. The policy only covers 'persons or classes of persons entitled to drive (are) any person who is driving on the policyholder's order or with their permission'. Since Wan Din was not permitted by Proton to drive BCQ

8343, Talasco is not obliged under s 96(1) of the RTA to settle the judgment sum in favour of the appellant obtained in Civil Action 53–100 of 1998. A

[9] Proton in their pleadings supported the stand taken by Talasco. In addition, it highlighted the decision in Civil Action No 53–100 of 1998 which dismissed the appellant's claim against Proton as owner of the said car. This implies that Proton was not vicariously liable to the appellant when Wan Din, not being its servant and/or agent, was driving the said car without the order or permission of Proton. B

C

THE LAW

[10] To fully appreciate arguments in this appeal, it is necessary to first set out the law.

D

[11] Section 90(1) of the RTA specifies that:

> it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part. E

[12] Section 91(1)(b) of the RTA insists that such a third party risks insurance policy must be a policy which: F

> insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road … G

[13] Then under s 96(1) of the RTA:

> If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments. H I

FACTS

[14] It is not in dispute that the registered owner of BCQ 8343 was Proton at the material time of the accident. This car was used by one of its executive known as Ang Yew Jin (Ang). Ang lent this car to one Ahmad (Ahmad) for the latter's journey to Terengganu. Ahmad is the brother of Wan Din. During the journey on 6 May 1989, Ahmad felt tired and requested Wan Din to take over the wheels. It was while Wan Din was driving the said car that the accident occurred.

[15] It is the contention of Proton that though Ang had allowed Ahmad to drive the said car, Ang has never consented to permit Wan Din to use it. And this issue of consent has been dealt with in Civil Action No 53–100 of 1998 when the sessions court dismissed the appellant's claim against Proton for being vicariously liable for the acts of Wan Din. And there was no appeal by the appellant against this decision.

[16] Proton then added that since Wan Din was not an authorised or permitted driver of the said car, Talasco should not be made to pay the appellant under s 96(1) of the RTA. Consequently, this third party claim should be dismissed when no money is to be paid out to the appellant under the provisions of this Act.

HIGH COURT

[17] Though Talasco has pleaded res judicata in their defence, the High Court did not address this issue. Instead, the High Court deliberated on the evidence and arrived at a conclusion that since there was no express or implied consent given by Proton to Wan Din to drive the said car the third party risks policy taken out by Proton from Talasco is ineffective. When such policy is ineffective, the appellant's recovery claim against Talasco under s 96(1) of the RTA must fail.

[18] In addition, the High Court decided that it will not entertain any claim by the appellant against Motor Insurance Bureau of West Malaysia 'MIB' on the ground that this was not pleaded by the appellant.

ISSUES

[19] By virtue of the circumstances of this case, we are of the opinion that the issues before the Court of Appeal are as follows:

(1) Has the High Court erred in refusing to entertain the appellant's claim against MIB?

(2) Is the third party risks insurance policy effective? A

First issue: *Has the High Court erred in refusing to entertain the appellant's claim against MIB*

[20] First it is necessary to ascertain the origin and functions of MIB. A description of these is comprehensively set out in the Court of Appeal judgment of *Ramli Shahdan & Anor v Motor Insurer's Bureau of West Malaysia & Anor* [2006] 2 MLJ 116 at p 120; [2006] 1 CLJ 224 at p 227: B

HISTORICAL BACKGROUND C

> The Motor Insurers Bureau of Malaysia was conceived in social justice and was born into the then, Road Traffic Ordinance 1958 (now the Road Traffic Act 1987). The basis of this provision in the said ordinance was to recognise to some extent the unfortunate position of victims of road accidents, where experience has shown, by reason of legal technicalities, that innocent victims, despite the requirements of compulsory third party insurance, failed to obtain any compensation. See *New Indian Assurance Co Ltd v Simirah* [1966] 2 MLJ 4. D

Mechanism Involved In The Setting Up Of Motor Insurers Bureau

> The Motor Insurers Bureau does not exist as an insurance company, but is premised on an agreement entered into on 15 January 1968, between the Bureau and the Minister of Transport. It states in so far as is material, that: E
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> > … the Bureau will, subject to the provisions of these presents, pay or cause to be paid to the person or persons in whose favour such judgment was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs… or satisfy or cause to be satisfied such judgment. F

[21] The agreement referred to above signed by the Minister of Transport and MIB is commonly referred to as the principal agreement. There is another agreement among insurance companies in West Malaysia contributing towards the funds of MIB. This subsequent agreement is commonly termed as the Domestic MIB Agreement. G H

[22] This issue concerning a claim against MIB arose in Talasco's Defence. Paragraphs 19 and 20 of this defence state:

19. Selanjutnya, berdasarkan Perjanjian Motor Insurers' Bureau, pihak Motor Insurers' Bureau of West Malaysia adalah juga bertanggungjawab untuk mengindemniti liabiliti Encik Wan Din bin Hussin, sebagai pemandu yang tidak berinsurans, di dalam kemalangan yang material. I

20. Defendan akan membawa tindakan pihak ketiga terhadap Encik Wan Din bin Hussin serta pihak Motor Insurers' Bureau of West Malaysia atas alasan-alasan yang telah dinyatakan di dalam perenggan 17, 18 dan 19 di atas.

[23] When the appellant attempted to rely on these issues to formulate its claim against Talasco, the High Court ruled:

> Di peringkat ini saya ingin menegaskan adalah jelas bahawa plaintif dalam plidingnya tidak memplidkan pemakaian perjanjian domestik (Domestic Agreement) di antara Motor Insuran's Bureau of West Malaysia (MIB) dengan defendan bertarikh 30 January 1974 atau perjanjian di antara MIB dengan Menteri Pengangkutan bertarikh 15 January 1968 yang telah diganti dengan perjanjian MIB yang baru bertarikh 25 MARCH 1992. Oleh itu walaupun isu-isu mengenai perkara ini ada disenaraikan dalam kandungan 93D, dan walaupun dalam penghujahan mereka pihak-pihak ada menyentuh tentang perkara-perkara tersebut, Mahkamah ini tidak akan membuat keputusan tentang isu-isu tersebut.

[24] We are in full agreement with the views expressed by the trial judge. The pleaded case of the appellant against Talasco is based solely on the statutory provision of s 96(1) of the RTA. The appellant has only insisted that since Talasco had issued an insurance policy against third party risks for the said car, Talasco should settle the judgment sum ordered against Wan Din in Civil Action No 53–100 of 1998 under this provision of the law. The appellant has never sought recovery under the principal agreement which MIB had with the Minister of Transport or under the MIB domestic agreement. And if at all the appellant desired to mount such a claim in this manner, she should have pleaded this and included MIB as a party to this proceedings — see the case of *Ramli Shahdan & Anor v Motor Insurer's Bureau of West Malaysia & Anor* [2006] 2 MLJ 116. In this case, MIB was never included as a party to the proceedings nor were the appellant's claim framed in the nature of a claim against them. The trial judge has therefore arrived at a correct finding on this issue.

Second Issue: *Is the third party risk insurance policy effective?*

[25] To answer the question posed in the second issue, s 91(1) of the RTA must first be examined. This section makes it mandatory for the use of any motor vehicle to have an insurance policy against third party risks covering 'such person, or class of persons as specified in the policy in respect of liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on the road'. In this instance, Talasco has issued to Proton such a policy to cover a class of persons 'who is driving on

the policyholder's holder (Proton) order or with their permission'. So if a person who drove the said car is not within this class of persons, then the said policy is not effective on such occasion. Whether Wan Din fell within this range of persons depended on evidence. For certain, not being an employee of Proton, he could not have presumed to have such order or consent from Proton. But could an implied order or permission be given to him by persons who were allowed by Proton to use the said car thereby making him an agent of Proton when he drove the car? If such consent was given then the policy is effective.

[26] The trial judge has answered this in the negative with these reasons:

(1) Wan Din has admitted that he did not have permission from Proton to drive the said car at the material time.

(2) Although Ang has lent the car to Ahmad, there is no evidence to indicate that Ang has also agreed to allow Wan Din to drive it.

(3) When confronted with evidence from Ahmad that Ang did not impose upon Ahamd any restriction on the use of the said car, the trial judge dismissed this by declaring this as hearsay when Ang did not personally testify at the trial.

[27] But what was stressed upon us by Talasco and Proton during this appeal was not the findings of the High Court. Instead, emphasis was on the decision of the sessions court in Civil Action No 53–100 of 1998. Talasco and Proton submitted that this issue was already decided by the sessions court when it dismissed the appellant's claim that Proton was vicariously liable for the act of Wan Din. This same issue now raised should not be decided twice over.

[28] Against this argument, the appellant's counsel gave the feeble excuse that the findings of the sessions court was based on the non-existence of a master and servant relationship between Proton and Wan Din. It did not include a situation where the driver of the said car was not authorised to drive by Proton.

[29] We are of the view that this perspective of the appellant is devoid of merit. Vicarious liability is not confined only to a master and servant situation. It includes master and servant and/or agent. Agent was included in the pleaded case of the appellant in Civil Action No 53–100 of 1998 where at para 2 says:

> Defendan pertama adalah pada sepanjang masa material pemandu kereta yang didaftarkan dengan nombor BCQ 8343 yang memandu kereta tersebut sebagai ejen, pengkhidmat atau orang yang memandu dengan keizinan defendan kedua.

[30] So when agent was included for the purpose of determining whether consent or permission was granted to Wan Din to drive the said car, a finding on the absence of vicarious liability on the part of Proton would inevitably mean that no such order or permission was ever given by Proton to Wan Din at the material time to drive the said car.

[31] When this issue has been decided and there was no appeal against it then the principle of res judicata applies. The rational and effect of this is best explained by Gopal Sri Ram JCA in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104:

> The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s 11 of the Code of Civil Procedure; but even where s 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
>
> The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.
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> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit (see *Peareth v Marriott* (1883) 22 Ch D 182, *Hook v Administrator-General of Bengal and Others* LR 48 IA 187 and *In the Matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v Tan Yew Ghee and Another* [1936] MLJ 141 at pp 147–151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication (see *Louis Dreyfus v Aruna Chalayya* LR 58 IA 381). (Emphasis added.)
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> A failure to adhere to the principle expressed in the judgment of Sharma J just quoted may lead to chaos in the conduct of civil proceedings.

[32] One may argue that though the appellant and Proton may be common parties in Civil Action No 53–100 of 1998 as in this suit, but not Talasco. The simple answer to this is that in a recovery proceeding under s 96(1) of the RTA, the role of Proton as the insured is assumed by the insurance company which issued the third party risks policy — see *Ramli Shahdan & anor v Motor Insurer's Bureau of West Malaysia & Anor* and *Rafiah*

bte Bakar v East West-UMI Insurance Bhd [1992] 1 MLJ 39; [1992] 1 AMR 440. By this, Talasco is considered a party in the said civil action.

[33] So irrespective of the findings of the trial judge in this case, the issue on whether Proton had ordered or given permission to Wan Din to drive the said car at the material time has already been decided by the sessions court in Civil Action No 53–100 of 1998. Relying on the principle of res judicata, this same issue should not be litigated again. This matter has been decisively determined and there was no appeal against it. When this finding has a binding effect, it is our view that the policy of insurance issued by Talasco to Proton is ineffective (since it does not cover a person who is driving without the order or permission of the policyholder) for the purpose of this recovery claim.

CONCLUSION

[34] Upon this ground, we would dismiss this appeal with costs to both the respondents. The deposit to the respondents to account of taxed costs.

[35] Since Proton's counsel has brought to our attention that the High Court has inadvertently awarded costs against the appellant when dismissing Talasco's third party proceeding against Proton which should be borne by Talasco, the order of the High Court is varied to the effect that the costs below be paid by Talasco to Proton on the dismissal of Talasco's third party claim against Proton.

Appeal dismissed with costs.

Reported by K Nesan